SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-820

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PASCUAL GUANA-SANCHEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*

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Amsterdam, Federal Constitutional
Restrictions on the Punishment of
Crimes of Status, Crimes of General
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1974
No. 73-820

UNITED STATES OF AMERICA,

Petitioner,

v.

PASCUAL GUANA-SANCHEZ,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

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BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE AMERICAN CIVIL LIBERTIES UNION, AMICI CURIAE

Interest of Amici

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1, 1968, primarily to secure the civil rights of Mexican Americans through litigation and education. In its efforts to assist the Mexican American community achieve its rights under the law, MALDEF has been involved in litigation which has

challenged the traditional barriers facing Mexican Americans: abridgement of participatory, constitutional, and political rights; unequal educational opportunity; discriminatory employment practices; unequal educational opportunity; discriminatory employment practices; unequal distribution of public services; and law enforcement misconduct. Because both citizens and lawfully admitted resident aliens of Mexican ancestry are frequently victimized by overzealous searches for illegal aliens, MALDEF has challenged such activities in numerous lawsuits.

The American Civil Liberties Union is a non-profit private organization with a quarter of a million members. Its interest in this case is to vindicate the rights of citizens and aliens alike which are protected by the Fourth Amendment. Law enforcement officers are required to conform strictly with the requirements of that amendment so that they do not abuse their powers. The police officers in this case, as our brief demonstrates, failed to do so in several respects and we urge, therefore, that the decision of the court below be affirmed.

Statement of the Case

Respondent was indicted February 1, 1972, in the United States District Court for the Northern District of Illinois for violation of 8 U.S.C. 1324(a)(2), by

transporting three unlawful Mexican aliens within the United States knowing those aliens to be unlawfully within the United States and knowing or having reason to believe that those aliens had made an entry into the United States within the three prior years.

Respondent filed a pretrial motion to suppress evidence and to dismiss the indictment. After an evidentiary hearing and the submission of written briefs, the district court issued a memorandum opinion and order suppressing all evidence obtained from the interrogation of the three passengers found in respondent's automobile, including their future testimony (Pet. App. 16a-26a). 1/

1. Evidentiary Hearing. At about 2:30 a.m., November 17, 1971, in the Chicago suburb of Villa Park, Illinois, Officers Hall and Tenuto of the Villa Park police were conducting a traffic stop in the course of their routine patrol at the intersection of North Avenue and Addison Road. They observed respondent's automobile parked in a cut-off joining the two streets diagonally across the intersection from them approximately 150-200 feet away. They could see that the headlights and interior dome light of the

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1/ "Pet. App." refers to the appendix to the Petition for Certiorari.

vehicle were on and that there were three or four occupants, one of whom was looking at what appeared to be a map (A. 6-9). 2/

Believing the occupants to be lost, the two officers drove their marked squad car across the road and parked behind respondent's vehicle. They radioed their dispatcher at 2:33 a.m. that they were going to the aid of a motorist in distress and requested a license check on respondent's car (A. 9-11). 3/

The two officers, in full uniform and wearing badges, revolvers, extra ammunition, handcuffs, and mace, then approached respondent's vehicle, one on either side (A. 16, 56-57). They could see respondent at the wheel looking at a map of the Chicago area, one passenger in the front seat, two others in the back seat--one of whom appeared to be asleep, and three shopping bags containing clothing or other material (A. 17). Upon inquiry by Officer

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2/ "A" refers to the separate Appendix filed with the Court.

3/ It is standard operating procedure for Villa Park officers to radio in a license plate check any time they plan to leave their patrol car to investigate an automobile stop, whether or not the stop concerns a suspected traffic or criminal violation (A. 10).

Hall, stationed on the driver's side of the car, respondent said that he was looking for the restaurant of a friend, located on North Avenue in Lombard, the suburb immediately to the west of Villa Park. If that restaurant should not be open, respondent stated he was looking for another restaurant in Lombard for which he had a matchbook advertisement. Officer Tenuto returned to the squad car to radio "some of the other towns" and was told that there were no restaurants open in those towns later than 1 a.m. (A. 16-20).

Officer Tenuto then resumed his position on the passenger's side of the car and heard 4/ Officer Hall ask respondent for some type of identification. Respondent complied by producing a "valid Illinois driver's license" (A. 20-21). Respondent's name and address on the license matched the car registration information on the license plate check received by the officers "three to five minutes" after they had first radioed their dispatcher at 2:33 a.m. 5/ (A. 58). Had

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4/ Officer Tenuto was the only witness at the hearing.

5/ The license plate check also revealed that respondent's car was not stolen and

(footnote continued on p. 6)

respondent refused to produce his license, he would have been held or taken to the station where both he and his car would have been searched (A. 59-60).

Upon return of respondent's license, respondent and his passengers were still not free to leave (A. 23, 64). Pursuant to a "standard operating procedure" of the Villa Park Police Department to require identification of all persons in cars

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was not wanted in connection with any crime (A. 58).

There is some dispute over precisely when Officers Tenuto and Hall received the license plate check information. The district court, presented with Officer Tenuto's recollection refreshed with the use of the radio log (A. 58), found that the answer came at 2:35 a.m., two minutes after the radio request (Pet. App. 17a). Petitioner claims that the district court relied upon the radio log alone and that the log is not clear (Brief for Pet., 7-8 n. 4). There is no evidence to indicate that the dispatcher did not radio the information as soon as he received it. This call could have occurred at the time Officer Tenuto was radioing to inquire if any restaurants were open (A. 20, 57-58).

stopped at night, whether for a suspected traffic violation or for rendering assistance to motorists in distress (A. 26-28), Officer Hall then asked respondent's three passengers for identification (A. 23). The passengers, who had sat silent throughout the foregoing proceedings, responded with a shoulder shrug indicating that they did not understand the request. Although he had not heard any of the passengers speak, Officer Hall then asked respondent to translate his identification request into Spanish. Respondent complied and the passengers in the rear seat shook their heads "No." The passenger in the front seat handed the officers a card which neither could read. Officer Tenuto, however, recognized the words "Army," "military," and "Mexico" and concluded that it was a Mexican army identification card (A. 23-25).

Following their standard operating procedure further, the officers radioed their sergeant that they had two persons without identification. When their sergeant arrived at 2:37 a.m., the passengers in the rear seat who had failed to produce identification were "asked" through respondent to get out of the car and get into the sergeant's car to be taken to the station (A. 25-26). Officer Hall also "asked" respondent and his remaining passenger to follow the officers to the station (A. 28).

Upon arrival at the police station, the four were brought into a sergeant's office where the sergeant obtained the names and ages of the three passengers by again using respondent as a translator (A. 29-30). Meanwhile, other officers were searching respondent's car without his consent (A. 63). The sergeant then called the night officer of the Immigration and Naturalization Service who could speak Spanish and directed each of the three passengers to speak with the officer on the phone. At the conclusion of the telephone interrogation, the sergeant acting upon the request of the Immigration officer, ordered the four locked up until Immigration could come to investigate the next morning (A. 31-33).

Officer Tenuto testified that he had three experiences with illegal aliens within the preceding four to five years. In each, he had been asked to assist other local officers in raiding a house where illegal Mexican aliens were thought to be residing. In each case, he and other local officers had held the persons apprehended until Immigration officials came to take them away (A. 39, 44-45). Officer Tenuto also testified that he was unable to tell Puerto Ricans from Mexicans and that he did not know whether Puerto Ricans were American citizens (A. 55).

2. The Ruling of the District Court. In an oral opinion delivered June 8, 1972, the district court granted respondent's motion to suppress. The court found that from the time Officer Hall returned respondent's license, there was neither probable cause to arrest nor reasonable suspicion for an investigative stop. The court found that the ensuing detention of respondent and his car for the purposes of interrogating the three passengers was an unconstitutional detention and search in violation of respondent's Fourth Amendment rights (Pet. App. 19a-21a, 25a-26a). The court specifically disapproved the Villa Park Police Department policy of obtaining identification from all persons stopped in cars at night (Pet. App. 20a-21a, 25a). Both the identification of the passengers and their future testimony were suppressed since they had been discovered "not merely as a result of illegal police conduct but in the course of that conduct," and the government had shown no independent source and "no attenuating circumstance whatsoever" (Pet. App. 24a-25a). The court also found the officers' conduct in violation of Illinois law, and that Illinois officers have no authority to make arrests for violations of federal immigration laws (Pet. App. 20a-23a).

3. The Ruling of the Court of Appeals. The order of the district court was affirmed on appeal July 18, 1973. Peti-

tioner conceded before the Court of Appeals that the interrogation of the passengers constituted a search of respondent's car to which respondent had standing to object. Petitioner also conceded that the future testimony of the passengers flowed from that search and that it could be suppressed by respondent if the Court of Appeals were to agree with the district court that the detention and search of respondent's car was illegal (A. 77-78). The Court of Appeals found an arrest at the time that the officers "asked" respondent to drive his car to the station, and held that action sufficient evidence of police illegality to support affirmance of the district court's suppression order. As to the preceding search, detention, and interrogation, the Court of Appeals expressed no opinion, concluding: "We have considered, but need not pass upon, other points raised" (Pet. App. 5a). 6/

6/ How petitioner can conclude that the Court of Appeals opinion "evidently agreed with the government that the initial questioning of the passengers while in respondent's car was not an unlawful search" (Brief for Pet., 10), is a mystery.

Summary of Argument

All evidence suppressed below had been obtained as a direct result of a series of police violations of respondent's Fourth Amendment rights. These violations emanated from an unwritten "standard operating procedure" of the Villa Park police to require proof of identification from all persons in cars encountered by the police at night for any reason. According to Villa Park procedure, failure to produce proof of identification results in arrest and a trip to the station for further investigation even when the police entertain no articulable suspicion of criminal activity on the part of those investigated.

In the instant case, the police never entertained any reasonable, articulable suspicion of criminality on the part of respondent or any of his passengers until some time after the arrest. Respondent's license and registration were found in order. His account of where he was going did not create any reasonable suspicion in the minds of the police. The objective facts in the record create no reasonable cause for an investigative stop; the officer who testified indicated no belief of reasonable cause for an investigative stop; and the district court found no such cause. Nevertheless, respondent and his car were detained along the roadside, his car was searched for

documentary proof of identification of its occupants, and he and his passengers were arrested and taken to the station when two of the passengers were unable to produce written proof of identification.

The evidence suppressed was obtained in part during the roadside stop and in larger part from investigation some fifteen minutes later at the station. All evidence suppressed was sought by the police in furtherance of their unconstitutional "standard operating procedure," directed against respondent and his vehicle. No evidence of attenuation or independent source was introduced below. Respondent therefore has standing to object to the direct fruits of police violations of his Fourth Amendment rights.

The deterrent effect of the exclusionary rule in the instant case is particularly significant for Mexican Americans and other minority groups who have the most to lose when police discretion is as broad and uncontrolled as that permitted by the Villa Park "standard operating procedure."

A R G U M E N T

I

RESPONDENT HAS STANDING TO OBJECT TO ALL EVIDENCE DIRECTLY RESULTING FROM VIOLATIONS OF HIS CONSTITUTIONAL RIGHTS PURSUANT TO VILLA PARK'S UNCONSTITUTIONAL PROCEDURE OF REQUIRING PROOF OF IDENTIFICATION FOR ALL OCCUPANTS OF CARS ENCOUNTERED AT NIGHT.

All evidence suppressed by the district court in this case is the direct and proximate fruit of a continuing course of police violations of respondent's Fourth Amendment rights of which the illegal arrest conceded by petitioner is only one stage. This continuing course of police illegalities has a common denominator: the "standard operating procedure" of the Villa Park Police Department to require proof of identification of all persons in cars encountered by the police at night for any reason whatsoever. Failure to offer proof of identification in Villa Park results in further detention at the police station for further investigation (A. 25-28). This "standard operating procedure," which is not in writing and has never passed judicial or legislative scrutiny, flies in the face of the Fourth Amendment. Nothing like it has ever been tolerated by this Court. See Almeida-Sanchez v. United States, 413 U.S. 266

(1973). 7/ Cf. Papachristou v. City of

7/ The instant case differs from Almeida-Sanchez in that the "standard operating procedure" involved derives merely from the oral testimony of Officer Tenuto in the suppression hearing below and has no basis in state or federal statutes. In addition, Villa Park officers are privy to no special training in the enforcement of the immigration laws. The Villa Park procedure is like the practice condemned in Almeida-Sanchez in that it permits "unfettered discretion" for the officer in the field. 413 U.S. at 270.

Officer Tenuto testified that the Villa Park procedure had been instituted because of burglaries in the area, although he gave no information to support or make more specific this assertion (A. 27). This Court's response to a similar argument of law enforcement needs in Almeida-Sanchez is particularly appropriate:

> "It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain

Jacksonville, 405 U.S. 156, 169 (1972); Palmer v. City of Euclid, Ohio, 402 U.S. 544 (1971).

A. At No Time Prior to the Events in the Police Station did the Officers have Reasonable Cause to Stop or Probable Cause to Arrest.

From the time Officers Hall and Tenuto first saw respondent's car to the time respondent was under arrest at the station, his car searched, and his passengers being interrogated over the telephone by Immigration, the Villa Park Police had no more than "inarticulate hunches" of criminal activity. Terry v. Ohio, 392 U.S. 1, 22 (1968). At no time in the suppression hearing did Officer Tenuto testify that he or any of his fellow officers harbored reasonable suspicions of criminal activity based on articulable facts prior to learning from the Immigration Officer that the passengers might have illegally entered the country. On the contrary, the police thought their conduct justified on the basis of their standard operating procedure of obtaining identification of all

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exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." 413 U.S. at 273.

persons in cars encountered by the police at night. 8/

According to the testimony of Officer Tenuto, the initial encounter with respondent was motivated by the officers' intent to "see if they are lost or anything is wrong" (A. 10). Although there is some evidence to suggest that their motivation was for general investigation--e.g., the radio log indicating that they were "checking out" the vehicle (A. 15, 76), the radio check on the car's license plate (A. 10-11, 15), and the manner in which both officers approached the car (A. 16, 56-57)--the district court concluded that the officers were going to the aid of a motorist in distress (Pet. App. 17a). The care-taking justification for the officers' presence, cf. Cady v. Dombrowski, 413 U.S. 433 (1973), came to an end when they had directed respondent to one of the restaurants he was seeking and had radioed to find out whether restaurants in general in the area were open. Officer Tenuto testified to no suspicions, reasonable or otherwise, arising out of the colloquy about restaurants, and the

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8/ Such encounters might range from traffic stops to the police stopping to assist someone with a flat tire (A. 27-28).

district court found none. 9/

However, respondent was not free to leave at that point. Pursuant to the Villa Park procedure of requiring identifications from occupants of cars stopped at night, Officer Hall asked respondent for "some type of identification" (A. 20). Although courts have disagreed over whether officers must indicate articulable facts upon which reasonable cause may be based in order to make routine checks on driver's licenses, compare Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973), with Palmore v. United States, 290 A.2d 573 (D.C.App. 1972), aff'd. on other grounds, 411 U.S. 389 (1973), the requirements of Terry v. Ohio are surely present for all other investigative stops. Palmore, supra, at 583 n. 24 (authorities

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9/ The dissenting judge in the Court of Appeals accepted petitioner's assertion that respondent's "story . . . did not check out" (484 F.2d at 593, Pet. App. at 6a). This is not a fact found by the district court or asserted in the testimony of Officer Tenuto, and appears to be second-guessing at best. It does not necessarily follow that if the restaurant was closed, respondent was lying when he said he was looking for it. Nor was it ever established that the restaurant was in fact closed (A.20).

Respondent did not argue below and does not contend here that this first identification request violated his constitutional rights. However, it is clear from Officer Tenuto's account that this request was the beginning of a series of demands made upon respondent pursuant to the same illegal police procedure. 10/

10/ Although on direct examination Officer Tenuto relied entirely on his Department's night identification policy to justify the request made of respondent, he added on cross-examination a reference to Smith-Hurd Ill. Ann. Stat. ch. 95-1/2, §6-112 (1970), which authorizes Illinois officers to demand to see the driver's license of anyone operating a motor vehicle. This statute has been strictly interpreted, however, so as to prohibit its use in the factual setting of the instant case. In People v. Harr, 93 Ill. App. 2d 146, 235 N.E. 2d 1 (1968), the court noted that the statute was for purposes of license checks only and could not be used "for the purpose of finding out who the defendant was, where he had been and where he was going. The statute cannot . . . be . . . a mere subterfuge to obtain information or evidence not related to the licensing requirement." 93 Ill. App. 2d at 149-50, 235 N.E. 2d at 2. In addition, officers may not demand licenses under this statute unless the driver is actually operating the

Still no suspicions, reasonable or otherwise, had been aroused concerning the activities of respondent or his passengers. The check of respondent's license and the information on the license plate check run by radio had shown that respondent resided nearby in Chicago, that the car was his own, and that his license and registration were in order. Nevertheless, Officer Tenuto testified that if respondent had attempted to leave at that point to find the restaurant he was looking for in Lombard, the officers would have given chase and stopped him again (A. 64-65). Clearly the district court was correct in ruling that at this point, respondent could no longer be legally detained. Palmore, supra, at 583.

The purpose of the continuing detention of respondent and his car was to enable the officers to obtain proof of identification from each of the three passengers pursuant to the Villa Park procedure of requiring identifications from occupants of cars stopped at night. As petitioner conceded in the Court of Appeals, the district court properly charac-

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car. People v. Francis, 4 Ill. App. 3d 65, 280 N.E. 2d 49 (1972)(officer pulled up behind car drawn partly off the road to assist motorist in distress and asked for license--evidence suppressed).

terized the demand for identifications as a search of respondent's car. Petitioner has somehow inferred from the silence of the Court of Appeals on this point (which petitioner itself withdrew from that court's attention) that the Court of Appeals somehow disapproved the district court's characterization (Brief of Pet. 13). Now, in a footnote, petitioner challenges the point it conceded below, 11/ contending that the passengers were in plain view (Brief of Pet., 13 n. 9). Whether or not the passengers were in plain view--not an unusual occurrence--their identities and documentary proof thereof, which were the object of the police search, were not in plain view. Cf. United States v. Ward, 488 F.2d 132 (9th Cir. 1973)(en banc). This Court has long held that detention for purposes of obtaining identification evidence is a search and seizure within the meaning of the Fourth Amendment. Davis v. Mississippi, 394 U.S. 721 (1969). To search respondent's car in this manner without a warrant, the petitioner bears the burden of demonstrating probable cause. Carroll v. United States, 267 U.S. 132 (1925). At the very

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11/ This Court has in the past refused to hear arguments not made in the Courts of Appeals. Lawn v. United States, 355 U.S. 339, 362-63 n. 16 (1958).

minimum, reasonable cause to search must be established. Davis, supra, at 727 (dictum). See also Almeida-Sanchez, supra, at 275-85 (Powell, J., concurring). Unless petitioner wishes to contend that the passengers by their appearance, or because their driver's name was Spanish, created a reasonable suspicion that they might be illegal immigrants, there was no justification for this search for identification evidence. Petitioner is doubtless unwilling to make such a contention in light of its resounding rejection in other cases occurring much closer to the Mexican border, e.g., United States v. Olivares, 496 F.2d 657 (5th Cir. 1974); United States v. Mallides, 473 F.2d 859 (9th Cir. 1973), and in light of the lack of experience of the Villa Park officers in immigration cases and Officer Tenuto's confessed inability to identify Mexicans. 12/

12/ Officer Tenuto's experience with immigration offenses was limited to a supporting role in three raids over the preceding four to five years (A. 39, 44-45). He testified that he could not tell Mexicans from Puerto Ricans and did not know whether the latter were American citizens. Indeed the district court's holding that Illinois officers were not permitted to arrest for violation of federal immigration law (Pet. App. 20a-23a) can be seen as reflecting that court's

The status of the passengers as aliens illegally in the country was no more in the plain view of the officers than the contents of a film when rolled up on a reel, Stanley v. Georgia, 394 U.S. 557, 571 (1969)(Stewart, J., concurring), or the contents of a tape recording before it is played, United States v. Hunt, 366 F. Supp. 172 (N.D.Tex. 1973).

In order to execute fully their standard procedure of obtaining identification from occupants of cars stopped at night, Officers Hall and Tenuto not only detained respondent and searched his car, they made respondent the instrument of their search. Respondent was made to translate for the officers to assist them in obtaining from his own passengers documentary proof of identification. Unlike most requests for identification evidence, this particular inquiry was to elicit evidence directly incriminating respondent. In a sense, the passengers were the contraband in the crime of transport-

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concern over the efforts of local law enforcement to catch illegal aliens. When their unguided assistance is encouraged by Immigration officials, local law enforcement may accomplish far greater intrusions into liberties of foreign-born Americans than federal officers could or would ever attempt.

ing illegal aliens. Their documentary evidence of identification or lack thereof constituted a major element of proof in the indictment against respondent. Cf. United States v. Ward, 488 F.2d 162 (9th Cir. 1973)(en banc). Coupled with the lack of Miranda warnings (A. 61-62), the translation procedure suggests a violation of respondent's Fifth Amendment rights which is not urged in this Court. However, this procedure also supports the argument that the object of the officers' search was not in plain view. To obtain that object, the officers extended their intrusion into the interior of respondent's vehicle beyond their plain view to the evidence they could not see. The interrogation of the passengers through respondent's translation was just as much a search as if respondent had been asked to open his glove compartment to reveal physical evidence of crime. That conduct, we submit, violated respondent's Fourth Amendment rights.

Petitioner hints that Officer Tenuto's meager experience with illegal aliens coupled with the apparent inability of the passengers to understand the officers' questions may have provided cause for their arrest and transportation to the station (Brief of Pet., 6). Not only is there no support in law for such a proposition and no argument by petitioner on the point, it is apparent from both the testimony and the actions of the officers

themselves that they had no suspicions concerning the immigration status of the passengers. Only two of the passengers were placed in the squad car. The passenger who had displayed what the officers took to be a Mexican Army card was left in respondent's vehicle (A. 25). Respondent's arrest apparently related to the officers' need for continuing translation assistance. The officers indicated from their actions that their justification for all their preceding activities, beginning with the request for respondent's identification, flowed directly and solely from their unconstitutional standard operating procedure to require proof of identification from all occupants of cars stopped at night.13/ Thus the arrests, including that of respondent, were simply the next stage of their illegal procedure (A. 25-28).

The final stages of the Villa Park night identification procedure were carried on at the station where the identities of the passengers were obtained (again

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13/ Officer Tenuto testified:

"The sergeant, due to the fact that they didn't have any identification on them, the sergeant asked if they would mind coming to the station through Mr. Sanchez" (A. 25).

through the translation of respondent), respondent's car was searched for physical evidence, and further incriminating statements were apparently made by the passengers over the telephone to an Immigration officer. Only then was reasonable cause established for any intrusion upon respondent. Throughout the entire episode, the Villa Park police perceived themselves as carrying out a Department procedure which they thought and may still think legitimate. It is the function of the exclusionary rule to deter such unconstitutional police procedures. 14/

B. Respondent has Standing to Object to the Use of All Evidence Directly Resulting from Police Violation of His Constitutional Rights.

14/ Chief Justice Warren wrote in Terry v. Ohio, 392 U.S. 1, 15 (1968):

> "Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruit must be excluded from evidence in criminal trials."

Petitioner conceded in the Court of Appeals that respondent had standing to object to evidence, including the future testimony of witnesses, flowing from the search of respondent's car (A. 77). Petitioner chose to argue instead that the search was constitutionally permissible. In this Court, petitioner argues that respondent has no standing to object to the evidence suppressed if suppression is based solely on respondent's illegal arrest. The argument ignores the fact that the arrest was itself the product of an illegal search and an integral part of a procedure of the Villa Park police which violates the Fourth Amendment. Petitioner further suggests that it would like to raise again the issue of whether the future testimony of witnesses may be suppressed (Brief of Pet. at 15-16) should its standing argument fail. This, we submit, petitioner cannot do. Lawn v. United States, 355 U.S. 339, 362-63 n. 16 (1958); Giordenello v. United States, 357 U.S. 480, 487-88 (1958). 15/ Should

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15/ In Giordenello, the Court rejected the Government's argument, raised for the first time in this Court, that the arrest in issue could be justified as based on probable cause, even though the warrant might be defective. Mr. Justice Harlan, writing for the Court, concluded that to

this Court agree with the district court that the chain of police illegality began with the search of respondent's car in which the police sought proof of identification from the passengers through respondent's translation, petitioner's earlier concession of respondent's standing should be accepted and the suppression order of the district court should be affirmed.

> "This is so because in the District Court petitioner, being entitled to assume that the warrant constituted the only purported justification for the arrest, had no occasion to cross-examine Finley or to adduce evidence of his own to rebut the contentions that the Government makes here for the first time." Giordenello v. United States, 357 U.S. at 488.

In like measure, if the Court were to take up the question of whether the future testimony of witnesses should be considered suppressible as the poisoned fruits of illegal police activity, it

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permit the Government's argument would introduce both legal and factual issues to which the defendant had not had the opportunity to respond in the district court.

would need a fuller factual record on the issues of attenuation and independent source. The present record gives little hint of the degree to which the future testimony of the passengers against respondent was the product of the voluntary choice of the passengers or whether those passengers are even willing at this time to testify at all.

The suppression order of the district court was limited to the evidence obtained as a direct result of Villa Park's unconstitutional policy of requiring proof of identification from all occupants of cars encountered at night irrespective of the reasons for the encounter. In the instant case, that policy caused the police to detain respondent and his car along the highway, search the car for documentary proof of identification of all its occupants, arrest respondent and take him and his car to the station, use respondent to further interrogate his passengers at the station, and search his car thoroughly at the station for physical evidence of crime. The incriminating statements of the passengers were obtained in furtherance of this policy directed in the first instance at respondent, and in close temporal proximity to the violations of respondent's Fourth Amendment rights. At no time did the Government attempt to show, nor could they have shown, that there was an independent source for any of the evidence suppressed, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), or

that the taint of the violations of respondent's rights had attenuated in any measure, Nardone v. United States, 308 U.S. 338 (1939).

This Court has repeatedly emphasized that the exclusionary rule is to be limited to those cases in which "its remedial objectives are thought most efficaciously served." United States v. Calandra, 414 U.S. 338, 348 (1974).

> "Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. [Citations omitted] The standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search" (dictum).

Nor is the Fourth Amendment's exclusionary rule limited to physical evidence. Alderman v. United States, 394 U.S. 165 (1969); Wong Sun v. United States, 371 U.S. 471 (1963). In Alderman, the Court explained that even the verbal evidence of third parties could be suppressed when that evidence was obtained by intruding upon the premises of the defendant in violation of the defendant's Fourth Amend-

ment rights. Mr. Justice White, writing for the Court, explained why:

> "If the police make an unwarranted search of a house and seize tangible property belonging to third parties--even a transcript of a third-party conversation--the homeowner may object to its use against him, not because he had any interest in the seized items as 'effects' protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment." 394 U.S. at 176-77.

In the instant case, the police searched respondent's car, using him as translator, for physical evidence of identification of respondent and his passengers. Upon discovering the Mexican Army card of one passenger, and the absence of identifications for the other two passengers, they took the next step in their unconstitutional policy of requiring identifications at night by arresting all four persons and taking them to the station for further interrogation. Once at the station, the police obtained the names and birthdates of all three passengers orally through respondent's translation. They then used this information to check out all three passengers with a federal Immigration officer. This check resulted directly in further oral evidence incriminating respondent.

At all times in this transaction the goals of the Villa Park police remained the same: to obtain proof of identification and to check to see if there was any evidence of criminality associated with those names. Had they not obtained an answer from their check with Immigration, it is uncertain when this investigation would have ended or how much further the police would have piled up their record of illegal intrusions to satisfy their curiosity. The evidence of identification or lack thereof, along with the direct fruits of the police effort to check out identification, was the basis for the indictment of respondent and is the evidence which the district court suppressed.

The Government argued no evidence of an independent source for any of this information and the district court found none. Indeed it is difficult to imagine how three illegal aliens might come to risk their own deportation and prosecution by coming forward of their own free will to incriminate respondent. Nor is it likely that the Villa Park police, whose normal duties do not include enforcement of federal immigration law, might otherwise come across three illegal aliens who had the misfortune of passing through Villa Park on their way to another destination.

Nor is there any suggestion that any evidence was suppressed, the taint of which may have become attenuated. If the Government wishes to return to the district court and try this case with evidence which it believes untainted because of the principle of attenuation, it remains free to do so. There is no evidence before this Court on which to base a finding of attenuation and none was urged below. 16/

Finally, petitioner dangles before the Court the issue of whether the future testimony of witnesses is suppressible as the poisoned fruit of police illegality (Brief for Pet. at 15-16). We agree with petitioner's earlier statement that "this case does not present a suitable vehicle for the issue" (Pet. at 11-12 n. 4), but for different reasons. First, the lower courts have largely ignored such a per se rule, resolving the problem on a case-by-case basis pursuant to the doctrines of

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16/ The district court found:

> ". . . no attenuating circumstance whatsoever. The witnesses whose testimonys [sic] are sought to be suppressed were discovered not merely as a result of illegal police conduct but in the course of that conduct" (Pet. App. 24a).

attenuation and independent source. 17/

17/ See, e.g., United States v. Falley, 489 F.2d 33 (2d Cir. 1973); United States v. Beasley, 485 F.2d 60 (10th Cir. 1973); United States v. Resnick, 483 F.2d 354 (5th Cir.), cert. denied 414 U.S. 1008 (1973); Gissendanner v. Wainwright, 482 F.2d 1293 (5th Cir. 1973); United States v. Marder, 474 F.2d 1192 (5th Cir. 1973); United States v. Mallides, 473 F.2d 859 (9th Cir. 1973); United States v. Evans, 454 F.2d 813 (8th Cir. 1972); United States v. Nagelberg, 434 F.2d 585 (2d Cir. 1970); United States v. Hoffman, 385 F.2d 501 (7th Cir. 1967); Williams v. United States, 382 F.2d 48 (5th Cir. 1967); Brown v. United States, 375 F.2d 310 (D.C.Cir. 1966); Smith v. United States, 344 F.2d 545 (D.C. Cir. 1965); United States v. Tane, 329 F.2d 848 (2d Cir. 1964); McLindon v. United States, 329 F.2d 238 (D.C. Cir. 1964); Smith and Bowden v. United States 324 F.2d 879 (D.C. Cir. 1963), cert. denied 377 U.S. 954 (1964); United States v. Alston, 311 F. Supp. 296 (D.C. 1970); People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal.Rptr. 18 (1963)(en banc); Abbott v. United States, 138 A.2d 485 (D.C. Mun. Ct. App. 1958); People v. Albea, 2 Ill.2d 317, 118 N.E. 2d 277 (1954); State v. Rogers, 27 Ohio Op.2d 105, 198 N.E.2d 796 (Ct. Com. Pleas 1963); Commonwealth v. Cephas, 447 Pa. 500, 291 A.2d 106 (1972); State v. O' Bremski, 70 Wash.2d 402, 423 P.2d 530 (1967).

Second, this Court has always assumed that oral testimony and the identity of potential witnesses, like physical evidence, is suppressible under the poisoned fruits doctrine. Alderman, supra, at 176, 182; Wong Sun, supra, at 484-86. Cf. Kastigar v. United States, 406 U.S. 441, 453, 459-60 (1972). Third, there is an inadequate factual record in this case on which to base such a sweeping change in the law. 18/ Facts concerning the witnesses' "attributes of will, perception, memory and volition" are absent from this record. Smith and Bowden v. United States, 324 F.2d 879, 881 (D.C. Cir. 1963), cert. denied, 377 U.S. 954 (1964). Fourth, whereas the "name of a potential witness" may be "of no evidentiary significance, per se" in many cases, Smith and Bowden, supra, at 881, the names of respondent's passengers in the instant case, coupled with their documentary proof of identification or lack thereof, were of immense evidentiary significance to respondent. Once the names were checked with Immigration, it was a short step for the police to establish probable cause to arrest respondent for the crime ultimately charged. In this case, more so than most, the witnesses were like inanimate evidentiary objects which speak for themselves. They were the contraband in the crime with which respondent was charged.

18/ See note 15 supra.

C. Deterrence of the Illegal Police Procedure in this case will have Particular Impact on the Rights of Mexican Americans and Other Minority Groups.

In concluding his opinion and order, District Judge Parsons noted:

> "I cannot help but wonder whether or not the fact that the defendant is of Mexican origin, though a citizen of the United States, was not simply and only instrumental in his arrest. Would the same treatment have been afforded four Caucasians in the same situation, with the same circumstances, particularly where the driver's papers were in order? I believe not" (Pet. App. 25a).

Though the record discloses no hard evidence of racial motivation for the conduct of the arresting officers (none of the arrestees testified), such motivation, where it exists, need never come to the attention of a court so long as the night identification policy of the Villa Park police is permitted to exist.

The vice in the Villa Park police procedure, urged here on Fourth Amendment grounds, is the same vice this Court has identified in vagrancy ordinances on due process grounds. As the Court noted in Papachristou v. City of Jacksonville, 405

U.S. 156, 170 (1972):

> Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law."

The sole difference between the vagrancy ordinances and the police procedure challenged by respondent in the instant case is that a criminal conviction may follow from the former. But the principal use of the vagrancy ordinances was to achieve indirectly what the Villa Park procedure achieves directly--unfettered police discretion to investigate wherever their unarticulable suspicions, their whims, or their biases might lead them. See generally, Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603 (1956); Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205 (1967).

That Mexican Americans and other persons of Latin-American origin suffer discriminations by law enforcement in this country is no secret. Though occasionally condemned by courts, the dark skins and racial characteristics of Mexican Americans often become an ingredient in police

assessment of reasonable or probable cause to stop, arrest, or search. See, e.g., United States v. Mallides, 473 F.2d 859, 861-62 (9th Cir. 1973); Petition for Certiorari at 4, n. 2; United States v. Peltier, No. 73-2509 (9th Cir., filed May 9, 1974), petition for cert. filed 43 U.S. L.W. 3017 (July 8, 1974)(No. 73-2000). When Mexican Americans are victims of crime, they are less likely to obtain police cooperation. Hearings on H.R. 2328 Before Subcommittee No. 1 of the House Committee on the Judiciary, 92d Cong., 1st Sess., 722 (1971)[1971 Hearings]. Mexican Americans are frequently the victims of shakedowns and fraud by private employers and police who believe they are illegal aliens and are therefore unable to report such activities without risking deportation. 1971 Hearings at 722, 852-55. Mexican Americans often suffer the biases of local politicians as well. 1971 Hearings at 745 (statement by Mayor of Blue Island, Illinois, that Mexican Americans urinate in the streets).

Most of the abuse suffered by Mexican Americans at the hands of law enforcement officers comes as a result of free-wheeling efforts to enforce the immigration laws against illegal aliens. The Immigration and Naturalization Service possesses statutory discretion to stop, arrest, and search far in excess of the authority possessed by other law enforcement agencies. Their abuses of this broad discre-

tion are only occasionally documented. See, e.g., 1971 Hearings at 800-01; Hearings on H.R. 982 Before Subcommittee No. 1 of the House Committee on the Judiciary, 93d Cong., 1st Sess., 82-83 (1973). To check these abuses, lawsuits have been instituted, for example, in the federal district court for the Central District of California to prohibit Immigration officials from using a person's color as a basis for detention. Loya v. Immigration and Naturalization Service, Civ. Act. 73-1435-FW (C.D.Cal., Complaint filed June 22, 1973).

Immigration officials also encourage state and local law enforcement agencies to assist in locating illegal aliens, and their techniques of enforcement and variations thereon are passed along to state and local officers. Although Villa Park officers, according to the record in the instant case, are only occasionally involved in such activities, the Illinois state police are considerably more active. 1971 Hearings at 774-77. Nor is this type of activity limited to Illinois. A suit has been filed in the federal district court for the Southern District of California, for example, seeking to enjoin overzealous state and local law enforcement officials from illegally detaining Mexican American citizens and lawful residents in the law enforcement officials' efforts to assist immigration officers in the apprehension of illegal aliens. Garcia

v. Hoobler, Civ. Act. 74-301-T (S.D.Cal., Complaint filed June 20, 1974). This Court has begun to recognize the need to curb some of the excessive discretion exercised by the Immigration and Naturalization Service. Almeida-Sanchez v. United States, 413 U.S. 266 (1973). This case presents one opportunity to curb the discretion of local police in their efforts to supplement the broad activities of federal officers.

The primary function of the exclusionary rule is deterrence. One function of the standing requirement is to focus the exclusionary rule upon those cases where deterrence is most likely to succeed. This case presents a clear example of a law enforcement practice which should be deterred and a defendant who was directly wronged by that practice.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully Submitted,

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*/ John McGrane, a student at Georgetown University Law Center but not a member of the bar, rendered substantial assistance in the preparation of this brief.